Supreme Court, U.S.
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No. 88-2008

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

ANTHONY RISH,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE APPELLATE COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

When a state procedural rule requires that the prosecution disclose impeachment evidence to a defendant only after a witness has testified on direct examination, is a defendant's Alford plea "unintelligent" when the defendant was aware that the witness was in police custody and the state represents at the plea proceeding its intention not to call the witness under any circumstances?

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OPINION BELOW

The opinion of the Appellate Court of Connecticut is reported at 17 Conn. App. 447, 553 A.2d 1145 (1989).

A timely petition for certification was denied by the Connecticut Supreme Court on April 13, 1989, and is reported at 211 Conn. 802 (1989).

JURISDICTION

The judgment of the Appellate Court of Connecticut was entered on February 7, 1989. A petition for certification was denied by the Connecticut Supreme Court on April 13, 1989. The petition for writ of certiorari was filed on June 9, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

[N]or shall any State deprive any person of life, liberty, or property, without due process of law....

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 17.1

A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) ...

(b) When a state court of last resort has decided a federal

question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Connecticut Practice Book § 744

After a witness called by the state has testified on direct examination, the prosecuting authority shall disclose any record of felony convictions of the witness known to the prosecuting authority and any record of felony or

misdemeanor charges pending against a witness known to the prosecuting authority.

STATEMENT OF THE CASE

In two companion cases, the petitioner pled guilty under North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (1970), to a total of two counts of sexual assault in the second degree and two counts of risk of injury to a minor. After obtaining new counsel and before sentencing, the petitioner sought to withdraw his pleas, contending, inter alia, that they were rendered "unknowing" or "unintelligent" by the state's failure to disclose that a potential state's witness was in police custody.

At the plea withdrawal hearing, the petitioner argued that he would not have

acknowledged the strength of state's case and pled guilty pursuant to the Alford doctrine if this impeachment evidence been divulged. The state responded that it had not intended to call this potential witness to testify if there had been a trial, and that the impeachment evidence at issue had been disclosed to the petitioner and was available when the guilty pleas were entered.[1] The trial court denied the petitioner's plea withdrawal request.

The Appellate Court upheld the trial court's refusal to allow the petitioner to withdraw his guilty pleas. According to the Court, impeachment evidence which is required to be

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[1]. On appeal, the state indicated that it had turned over the impeachment evidence in its response to the petitioner's discovery motion.

disclosed under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), and its progeny; see United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763 (1972); must be disclosed at a time when it can be used. 17 Conn. App. at 458; Petitioner's Appendix at A 14. The Court observed that under Connecticut Practice Book § 744, the petitioner was only entitled to the "claimed Brady material"--the pending charges against a potential state witness--after that witness had testified on direct examination. 17 Conn. App. at 458; Petitioner's Appendix at A 14-15. The Court reasoned that this impeachment evidence could not have been used until the time of trial, and that disclosure on the part of the state was

not obligatory prior to trial, before a criminal defendant enters a guilty plea pursuant to the Alford doctrine. Id.

REASONS FOR DENIAL OF THE PETITION

1. The petitioner misstates the facts of this case

The petitioner's argument is premised on the assertion that the state, in response to his discovery motion, failed to disclose that there were pending charges against a potential state's witness. This assertion is factually incorrect because prior to the petitioner's guilty pleas, the state, in its Answer to the Defendant's Motion for Discovery, had disclosed that the potential witness was in police custody. In addition, as the Appellate Court noted, the prosecutor represented at the hearing on the plea withdrawal request that the petitioner's first counsel had

been apprised of this information. 17 Conn. App. at 457 n.10.; Petitioner's Appendix at A 14 n.10. The petitioner was not deprived of the claimed Brady material when he assessed the state's evidence and pled guilty under the Alford doctrine. Consequently, certiorari review would be inappropriate for this fact-bound, inaccurate claim.

2. The Appellate Court's refusal to allow the withdrawal of the petitioner's guilty pleas was not violative of the due process clause

This Court has not considered whether the due process clause of the fourteenth amendment requires that the state disclose impeachment evidence prior to a criminal defendant pleading guilty under the Alford doctrine. Among the federal courts, only the Eighth Circuit has addressed the specific issue of what type of information must the

state furnish to the accused in order to ensure that his Alford plea is "knowing" and "intelligent." In White v. United States, 858 F.2d 416 (8th Cir. 1988), the Court concluded that the due process clause requires the state to disclose exculpatory evidence which would be "`controlling in the decision to plead'" under the Alford doctrine. Id. at 424, quoting Campbell v. Marshall, 769 F.2d 314, 324 (6th Cir. 1985), cert. denied, 475 U.S. 1048, 106 S.Ct. 1268 (1986) (establishing the same disclosure requirement for guilty pleas that admit to the commission of the charged offense).

a. There is no evidence in the record connecting the potential witness to this case

In the present case, even if the assumption is made that the state did

not disclose that a potential witness was in police custody, there is no indication in the record that this information would be controlling for purposes of the petitioner's Alford plea. Although the petitioner asserts that the Appellate Court deemed the information at issue to be exculpatory; Petition at 4; it was characterized in the opinion simply as the "claimed Brady material." 17 Conn. App. at 458; Petitioner's Appendix at A 15. Importantly, the petitioner has never suggested how the potential witness is connected to this case. Scrutiny of the information that was disclosed to the petitioner during discovery reveals that the potential state's witness was the brother of one of the victim's of the crimes charged, and that he allegedly

molested two other victims of those crimes. However, there is no evidence that this individual knew anything about the crimes committed by the petitioner. There is no support in the record for the petitioner's unsupported contention that the potential state's witness would have been an "important" witness. Petition at 4. It is for this reason that the state represented at the plea withdrawal hearing that it never intended to call this individual to testify at trial. 17 Conn. App. at 457 n.10; Petitioner's Appendix at A-14 n.10. If anything, the victims of the crimes charged would have been the state's key witnesses at trial. Evidence that would have called into question the credibility of another witness, whose connection to the crimes charged is

uncertain, reasonably could not have undermined the strength of the state's case or dissuaded the petitioner from pleading guilty. White, 858 F.2d at 424. Therefore, certiorari review is unwarranted because, under the facts of this case, the petitioner's plea was not rendered "unknowing" or "unintelligent" by the unavailability of information that a potential state's witness was in police custody.

b. Due process does not mandate the disclosure of general impeachment evidence prior to an accused pleading guilty under the Alford doctrine.

Assuming, arguendo, that the testimony of the potential witness would have played an important part in the state's case against the petitioner, the Appellate Court's determination that pending charges against this witness

need be disclosed only after his testimony on direct examination, as is required by Connecticut Practice Book § 744, implicitly and correctly recognizes that full disclosure of Brady material for purposes of a trial is not a necessary predicate for an "intelligent" plea pursuant to the Alford doctrine. See United States v. Wolczk, 480 F.Supp. 1205, 1211 (W.D. Pa. 1979) (court reluctant to require disclosure of all Brady material as a prerequisite to entering plea negotiations, but proscribes the state from misrepresenting its case to the accused in order to secure an admission of guilt). Although the defendant raises the general argument that this Practice Book provision would preclude adequate preparation by defense counsel prior to

cross-examination; see Petition at 6; trial preparation is not at issue in this case because the defendant elected to plead guilty instead of going to trial.

Pending charges against a witness whose testimony may well be determinative of guilt or innocence would fall under the rule of Brady because of the suggestion that that witness was susceptible to the influence of the state. Giglio, 405 U.S. at 154-55. Yet, impeachment evidence which may affect a witness' general credibility would seldom be controlling for purposes of deciding whether to plead guilty under the Alford doctrine. The impact of impeachment evidence at trial "cannot be answered with certitude..." See McMann v. Richardson, 397 U.S. 759, 770, 90

S.Ct. 1411 (1970). "The decision to plead guilty before the evidence is in frequently involves the making of difficult judgments." Id. at 769. Only the availability of information that would directly contradict an important witness' testimony on the elements of the crime charged has the potential for being controlling when the question of pleading guilty is weighed by the accused. Fambo v. Smith, 433 F.Supp. 590, 598 (W.D.N.Y. 1977), aff'd, 565 F.2d 233 (2d Cir. 1977) (prosecutor has a duty to disclose during plea bargaining evidence that is exculpatory of the elements of the crime charged). Here, the pending charges against the potential state's witness would have a bearing only on his general credibility. Certiorari review should be denied

because, prior to plea negotiations, the due process clause does require that the state disclose this type of impeachment information.

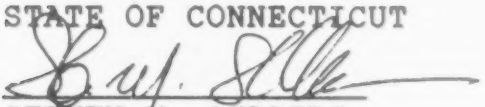
CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

THE RESPONDENT

STATE OF CONNECTICUT

BY: 

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